# CONFERENCE COMMITTEE LEGISLATION

BY LINDSAY ROGERS

IT is axiomatic that constitutional forms are less important than the forces behind them and that, in actual practice, the forms are profoundly modified by conventions and extra-constitutional arrangements. Burke was right in more ways than one when he said that the laws reach but a very little way. England is, of course, the classic example of the truth of this statement, for her Parliamentary Government is controlled very largely by unwritten conventions, and its success has depended on a high degree of political morality. For, as Mr. Strachey has felicitously said, the English Constitution is "a living thing, growing with the growth of men and assuming ever varying forms in accordance with the subtle and complex laws of human character. It is the child of wisdom and chance;" and, he might have added, of thoughtlessness and selfishness as well.

But even in the United States, with a written Constitution, conventions have been developed which have an importance in some respects equal to that of the provisions of the instrument itself.

Political parties (which the "founding fathers" sought to prevent); the perfunctory task of the Electoral College; the Cabinet; the attitude of the Executive toward the Legislature; senatorial courtesy; congressional procedure, and the relations between the two branches of Congress (hegemony in practice rather than in legal theory), are all matters determined by custom and the "complex laws of human character", and they have a profound influence on the Government. The exact nature of this influence cannot be determined from formal rules, but only from what is the actual practice. Government in action is more important than government in books, and it may, therefore, be worth while to direct attention to one development of congressional procedure which is not the least important of these extra-

constitutional minutiæ, and which has recently been used in such a way as to challenge its propriety.

I refer to the fact that many important laws passed by Congress are really written in secret by a small group of conferees whose decision is final on what should go into the bills. The Tax Revision law is a case in point. If the debates and record votes had any value, it was simply to admonish the conferees not to be too high handed, not to flaunt too much the opinion of the House they represented. Even this restraining influence was doubtful, for the conference report was denounced by both Senators and Representatives as being contrary to the dominant opinions in each branch of Congress. At best the institution of the conference committee, necessary though it may be, has not much to commend it; regret that some better machinery of adjusting disputes did not seem possible has frequently been voiced by the most conservative as well as by more radical members of Congress. But when, as sometimes has happened, the conferees use their powers to thwart the will of Congress, to put into effect their own views which have been defeated by the opposition, and to force through in the closing days of a Congress measures which need not be printed, and which, if fully understood and discussed, would be objected to, legislation by conference committees is the negation of popular government.

With the possible exception of Australia, only in the United States does the upper chamber possess powers equal to, or even greater than, those of the more popular body. From this extreme bicameral theory arises the necessity for some machinery that will adjust differences between the two Houses and prepare a measure to be passed in identical form. The institution of a conference committee comes into American parliamentary practice from England, but there it had fallen into desuetude even before the Parliament Act of 1911 so attenuated the powers of the House of Lords. Controversies between the two chambers are not serious, or, except in rare instances, prolonged. If public opinion or technical perfection seems to support amendments made by the Lords, the Commons acquiesce. This was the case, for example, with the modifications of the Defence of the Realm Act, and, more recently, the Emergency Powers Act. Since the

Government stands sponsor for practically all legislation, a conference between the Ministers and leading Peers in Opposition is able to compose the differences, and, indeed, ministerial responsibility is ordinarily sufficient to prevent conflicts between the chambers or the necessity for a conference. In the United States, however, legislative leadership is vested in the elder members of Congress (the seniority rule prevailing for the chairmanships of the committees that frame legislation); both branches of Congress have opinions that they insist upon, and even when there is agreement, the legislative product of one chamber is usually so imperfect that it must be improved by the other. Hence differences are reconciled and compromises are effected by a conference committee.

The former practice, in the appointment of conferees, was for the Speaker to ignore party lines and to select managers who would be specially fitted to uphold the position of the House. It was the practice also, in the event of failure to agree, to name a new set of conferring attorneys. But the present system is automatic. The chairman, next ranking majority member, and ranking minority member of the committee having the bill in charge, are invariably selected in each branch, although, in the case of important bills, the number of conferees may be increased to ten, or even more. This practice is so uniform that there was much comment when Speaker Cannon, in appointing the conferees for the Tariff bill of 1909, selected a member of the Ways and Means Committee in preference to one of his colleagues who was his senior.

In the appointments to legislative committees, the rule of seniority is rarely departed from, and this results—particularly in the Senate—in a disproportionate number of choice committee assignments for members with long congressional service. It follows, therefore, that legislation is framed by a comparatively small number of Representatives and Senators, and when this legislation goes to conference, these senior committeemen have the final authority. The situation is more extreme in the Senate than in the House, and the figures for the Sixty-fifth Congress were very striking. One hundred and five conference committees were appointed, but five Senators served on 82 of them: Smoot,

33; Warren, 23; Nelson, 11; Lodge, 9; and Penrose, 6. To prevent this concentration of power in the Senate, it was proposed several years ago that no Senator who was chairman of one of the ten most important committees of the Senate should be a member of any other of these ten committees, and this, in a modified form, was approved in 1919 by the Republican conference. Now a Senator may be chairman of only one important committee, and may be a member of no more than two. This will avoid the extreme oligarchic control of legislation in conference which was possible before the rule was adopted, but there are other grave dangers of abuse.

Successive changes in the rules of both branches of Congress have sought to reduce the powers of conference committees. In the House the report must be printed in the *Record* before it is acted upon, unless it is presented during the last six days of a Congress. In the Senate there is not even this empty safeguard. The conference report is subject to a point of order if the conferees have eliminated anything agreed upon by both Houses, or have inserted new legislation (this was not the rule in the Senate before 1918), but these general formulas are subject to abuse. Senators sponsoring particular measures sometimes do not object to amendments, knowing that they can be eliminated in conference. Thus, in 1916, during the discussion of the Water Power bill, Senator Nelson said that (from his point of view) a proposed amendment was "bad and vicious"; but he added: "We might let it go in and eliminate it in conference." An apparently immaterial amendment may be added by the chairman of the committee with the legislation in charge, for the express purpose of differing with the other House and thus securing the opportunity in conference to add matter, germane to the amendment and consequently proper under the rule, which he did not desire to present in open session. The rules now in force would probably prevent a writing of a new bill such as was done by the conference committee on the tariff of 1883, but sometimes curious things happen. For example, the conference report on the War Revenue bill of 1918 exempted congressional salaries from the eight per cent tax on incomes in excess of $6,000. This was new legislation, but it went through both branches almost

unnoticed—at least so far as appeared in the debate. On this particular measure the conferees worked eight hours a day for two weeks before they reported. The Senate added 320 amendments to the House bill and receded on only 55; the House gave way on 210 amendments, and the other differences were compromised.

Frequently measures remain in conference for long periods. The Oil Land Leasing Act passed the Senate in January and the House in May, 1918, and went to conference. The report was not made until February 18, 1919 and was then refused by the Senate because it contained new legislation. The measure was re-reported, but Senator La Follette filibustered against it and it went over to the next session. It passed the Senate again on September 3, 1919, and the House on October 30, but was not reported from the conference committee until February 10, 1920. The legislative history of the Water Power Act is equally significant. Conferees on this bill were deadlocked from September, 1918, to February 26, 1919, when the report was killed by Senator La Follette's filibuster. His speech, by the way, contained a very remarkable analysis of the powers of conference committees. The Water Power bill again passed the House on July 1, 1919, and the Senate on January 15, 1920, but the conference report was not adopted until May 31, 1920. These measures over which a battle has been fought to prevent an unchecked exploitation of the natural resources of the country warrant close study, for nowhere can the economic interests which are concerned by such legislation work more effectively and more securely than in the secret conference committees. The Esch-Cummins law, to give another example, was in conference for two months; and the conferees had enormous powers with reference to the labor provisions on which the House and Senate were in complete disagreement.

The House of Representatives has complained bitterly of the fact that almost without exception the conferences are held in the room of the Senate committee having jurisdiction of the bill. "Why should we go over there to listen to their reasons for amending our bill," asked Samuel J. Randall, "when the House asks the conference and holds possession of the papers?" In

one respect, however, a recent change in the rules of the House of Representatives has been designed to increase the power of this body and make it more of a match for the Senate. During the Fifty-fourth Congress, Mr. Cannon declared the rule to be "unvarying that the body proposing legislation as a rider upon a money bill must recede if the other body will not assent;" but the rule is broken. In that Congress the Senate added two million dollars of French Spoliation Claims to the General Deficiency bill and the House was forced to give way. The victory of the Senate was not lessened by the fact that President Cleveland vetoed the measure. The House has chafed for a long time at the fact that amendments, subject to points of order if originally offered in the House, are added to bills in the Senate and then retained by the conference committees, the House being forced to accept them or reject the whole conference report. The rule now provides that such amendments must be brought back to the House by the conferees for a vote. This takes from the conference committee the power which it has hitherto had of committing the House to Senate amendments. At the last session of the Sixty-sixth Congress, for example, the Senate added the Muscle Shoals amendment (involving $10,000,000) to the Sundry Civil bill. The House rejected it twice, and the Senate was forced to yield, although before the amendment of the rule, the conference report would probably have been forced through the House with the Muscle Shoals provision included. Nevertheless, with regard to appropriations, and particularly with regard to revenue, the House is subordinate to the Senate.

The Constitution, to be sure, gives the House the right to originate all bills for raising revenue, but that frequently means—the Tax Revision law is ample evidence—that the House has the right to originate the enacting clause. This measure, as it left the House after a perfunctory discussion of four days, was a series of amendments to existing statutes. The Senate wrote an entirely new law, in the form of 833 amendments to the House bill. The conference committee recommended that the Senate recede in the case of seven amendments; that the House recede on 760 of the Senate's proposals, and that the House recede with amendments in 66 cases. On the important question of the rate

on high incomes, the authority of the conferees was limited. In the House bill the maximum rate was 32 per cent.; the Senate amendment, forced through by the agricultural bloc, was 50 per cent., but the conferees (it was several times stated in the debate) would have been glad to agree on 40 per cent., for a majority of them, under the system of appointing conferees, were opposed to the 50 per cent. rate which, it was clear, was approved by the dominant opinions in both branches of Congress. But when the House sent the bill to conference, the attempt was made to instruct the House conferees to agree to the Senate amendment. Fearing defeat at that time, the House leaders refused the vote, but promised that, in passing on the conference report, there would be an opportunity of voting separately on this surtax question. The vote as taken was on an instruction to the conferees, not on the report itself, and even the letter from President Harding did not check a sufficient Republican deflection to result, in this case, in agreement between the two houses on the schedule. With this exception, however, it cannot be said that, on the controverted points of the bill, the conference committee reconciled differences between the House and the Senate. Rather did the Senate conferees seize the opportunity to make the bill more in accordance with their own views and to retrieve the defeats they had suffered at the hands of the agricultural bloc. Senator La Follette's amendment, providing that the taxpayer should include in his return a statement of his tax exempt securities, was eliminated, and the conferees thus postponed, for a time, a determination of the soundness of one argument of the opponents of high surtaxes. So also the conference report failed to include an amendment allowing inspection by appropriate congressional committees of the tax returns, to determine, for example, the need that a particular corporation might have for tariff protection.

So long as the American Government adheres to a more extreme bicameral theory than has been adopted by any other country in the world, the institution of conference committees will probably be necessary, but their perniciousness can at least be mitigated. It is the habit of all legislative bodies to rush bills through, with scant consideration, on the closing days of a session. Thus, when the second session of the Sixty-sixth Con-

gress came to an end on June 5, 1920, Mr. Wilson had not signed eleven measures. Nine of these had been sent to him the same day. Three appropriation bills were presented to him on June 4, and two on June 3, and forty-six other laws were signed on the last day of the Congress. The matter is particularly serious during the short sessions when Congress usually finds it impossible to finish all the Appropriation bills which are the reason for its meeting, and attempts to rush through other important legislation before the time the Constitution fixes for adjournment. There should be rules to prevent this legislative congestion. It might be provided, for example, that neither house could receive a bill from the other after January 15 of the short session, and that all conference reports must be made a certain time before adjournment, or at least be printed before being acted upon. Sessions of conference committees should be public, with record votes, and there should be, both in the Senate and in the House, a greater willingness to send measures back to conference. These would seem to be elementary safeguards and would certainly lessen the danger that conferees would do in conference what they were forbidden, or did not have the courage, to do in open session.

Senator Walsh was probably a little rhetorical when, in the debate on the Tax Revision conference report, he suggested that there is nothing "left for a free people except a political revolution" if a conference committee "completely nullifies the power and voice of the majority." Government by conference committees is never so unpopular that the people get at all excited over it, and, indeed, practically the only criticism of this secret method of agreeing on, and, many times, preparing new legislation, comes from Congress itself. It is there that the revolution should take place.

For a number of reasons the country now holds Congress in low esteem, and while it may be true that the complacence with which the Senate and the House view nullifying action by conference committees is a symptom rather than the disease itself, reform would, I think, be a material factor in arresting the decline of congressional influence.

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